IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT :

THE HONOURABLE MR. JUSTICE M.SASIDHARAN NAMBIAR

TUESDAY, THE 11TH SEPTEMBER 2007 / 20TH BHADRA 1929

RSA.No. 624 of 2007()

AS.49/2005 of PRINCIPAL SUB COURT,KOCHI
OS.554/2001 of ADDL.MUNSIFF COURT,KOCHI

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: APPELLANT- PLAINTIFF

K.K.ABDUL KHADER, AGED 65 YEARS,
S/O.KUNJU MEERAN, KARUKAPADATH HOUSE,
EDAVANAKKAD, NOW RESIDING AT THOUFEEK,
MANZIL, ARIKODE.

BY ADV. SMT.V.A.KASTHURI

RESPONDENTS: DEFENDANT

ABDUL RAHIMAN, AGED 58 YEARS,
S/O.KUNJUMEERAN, KARUKAPADATH HOUSE,
EDAVANAKKAD P.O. EDAVANAKKAD VILLAGE,
COCHIN TALUK.

BY

THIS REGULAR SECOND APPEAL HAVING COME UP FOR ADMISSION ON 11/09/2007, THE COURT ON THE SAME DAY PASSED THE FOLLOWING:

Order on I.A.NO.1274/2007 IN R.S.A.624/2007

11.9.07 Dismissed Sd/- M.Sasidharan Nambiar
Judge

/true copy/

P.S. To Judge

M.SASIDHARAN NAMBIAR,J.

R.S.A.NO.624 of 2007

Dated, this the 11th day of September, 2007

JUDGMENT

Plaintiff in O.S.554/2001 on the file of Additional Munsiff Court, Kochi is the appellant.Defendant is the respondent. Appellant instituted the suit seeking a decree for declaration of right of easement by prescription and permanent prohibitory injunction. Case of appellant is that he is the absolute owner in possession of the plaint schedule property which he obtained under Ext.A1 partition deed in 1986 and respondent is his brother and he also obtained 25 ½ cents as per the partition deed and tarward house was situated in the plaint A schedule property and property lying on the eastern side of the plaint schedule property is having an extent of 33 cents and was owned by P.B. Ali and for the ingress and egress of the main road on the eastern side from the tarwad house of the appellant, there is a pathway to reach the main road beginning from the north

eastern corner of the plaint schedule property and the said pathway is having 12feet width and 120 feet length and it is the plaint B schedule property and appellant and respondent were using the said pathway to reach the main road and appellant has prescribed a right of way by easement of prescription as it has been used as an easement peacefully and openly and without interruption as of right continuously for more than 100 years and that is the only way and therefore appellant is entitled to a decree for declaration and injunction. Respondent resisted the suit contending that the properties were divided only in 1986 and plaint A schedule property was allotted to the appellant and property lying to the north of the plaint schedule property was allotted to respondent and before partition it was lying as a single block and appellant and respondent were using a pathway lying on the western side of entire property owned by Kunju Meeran and that the said way starts from the western side of the entire property owned by Kunju Meeran and as per Ext.A1

partition deed the properties were divided and there is a small kaithodu having a width of 8 to 10 feet lying south to north on the werstern side of the entire property and two coconut tree trunks were put across the thodu to reach the western side of thodu and pathway begin on the north western corner of the properties divided between plaintiff, defendant and their brothers and then proceeds west to reach the Panchayat road and appellant and the predecessors used to go through that way and appellant has no right of way by easement by prescription over plaint B schedule property and the suit is only to be dismissed.

2. Learned Munsiff on the evidence of PWs. 1 to 4, DWs.1 and 2 and Ext.A1 to A6 and Exts.B1 and Exts.C1 and C2 dismissed the suit holding that appellant did not establish a right of easement of by prescription through plaint B schedule property. Appellant challenged the decree and judgment before Sub Court, Kochi in A.S.49/2005. Learned Sub Judge on reappreciation of evidence confirmed the findings of learned Munsiff and

dismissed the appeal. It is challenged in the second appeal.

3. Learned counsel appearing for appellant was heard.

4. The argument of learned counsel appearing for appellant is that the only way leading to the entire property owned by appellant and respondent originally which was in existence for more than 100 years and plaint B schedule property is a continunation of that road to the plaint A schedule property allotted to the appellant and this way has been used by appellant and his predecessors for more than 100 years as of right as an easement and without interruption and therefore courts below should have granted the decree sought for.

5. On hearing learned counsel I do not find any substantial question of law is involved in the appeal.

6.The joint properties were divided only in 1986 under Ext.A1 partition deed. Plaint A schedule allotted to appellant is a portion of whole property divided under Ext.A1. Plaint B

schedule property passed through the remaining property divided under Ext.A1 and allotted to respondents. Courts below on the evidence found as regards that portion of the property, appellant can claim a right of easement by prescription only after the division of the property in 1986 and suit has been filed before expiry of 20 years from the date of Ext.A1 partition and appellant cannot prescribe a right of easement over the co-ownership proeperties when the properties were jointly owned by appellant and respondent, and so the claim of right of easement by prescription is not sustainable. That finding is correct. In such circumstance, appeal is dismissed in limine.

M.Sasidharan Nambiar
Judge

Tpl/-